1992

American Vending Services v. Brent Dopp v. Douglas M. Durbano and Kevin S. Garn : Reply Brief

Utah Court of Appeals

Douglas M. Durbano; Walter T. Merrill; Durbano & Associates; Attorneys for Appellees/Cross-Appellants
Robert K. Hilder; Christensen, Jensen & Powell; Attorneys for Appellees.
James L. Christensen; Mark J. Morrise; Corbridge Baird & Christensen; Attorneys for Appellants .

IN THE UTAH COURT OF APPEALS

AMERICAN VENDING SERVICES, INC., a Utah Corporation,

Plaintiff/Appellee/
Cross-Appellant,

v.

BRENT DOPP, as Trustee of the WAYNE L. MORSE and DIANNE L. MORSE Irrevocable Family Trusts,

Defendants/Appellants/
Cross-Appellees,

v.

DOUGLAS M. DURBANO and KEVIN S. GARN,

Involuntary Plaintiffs/
Counterclaim Defendants/
Appellees.

Case No. 920651-CA

(Consolidated)

Argument Priority Class:

Priority No. 15

APPELLANTS' REPLY BRIEF

Appeal from the Third Judicial District Court for
Salt Lake County, the Honorable James S. Sawaya

Douglas M. Durbano
Walter T. Merrill
DURBANO & ASSOCIATES
Attorneys for Appellees/
Cross-Appellants
3340 Harrison Boulevard, Suite 200
Ogden, Utah 84403

Robert K. Hilder
CHRISTENSEN, JENSEN & POWELL
Attorneys for Appellees
175 South West Temple
Salt Lake City, Utah 84101

James L. Christensen, USB No. A0639
Mark J. Morrise, USB No. 3840
CORBRIDGE BAIRD & CHRISTENSEN
Attorneys for Appellants/
Cross-Appellees
215 South State Street, Suite 800
Salt Lake City, Utah 84111

IN THE UTAH COURT OF APPEALS

AMERICAN VENDING SERVICES, INC., a Utah Corporation, Plaintiff/Appellee/ Cross-Appellant, v. BRENT DOPP, as Trustee of the WAYNE L. MORSE and DIANNE L. MORSE Irrevocable Family Trusts, Defendants/Appellants/ Cross-Appellees, v. DOUGLAS M. DURBANO and KEVIN S. GARN, Involuntary Plaintiffs/ Counterclaim Defendants/ Appellees.	Case No. 920651-CA (Consolidated) Argument Priority Class: 16

APPELLANTS' REPLY BRIEF

Appeal from the Third Judicial District Court for
Salt Lake County, the Honorable James S. Sawaya

Douglas M. Durbano
Walter T. Merrill
DURBANO & ASSOCIATES
Attorneys for Appellees/
Cross-Appellants
3340 Harrison Boulevard, Suite 200
Ogden, Utah 84403

Robert K. Hilder
CHRISTENSEN, JENSEN & POWELL
Attorneys for Appellees
175 South West Temple
Salt Lake City, Utah 84101

James L. Christensen, USB No. A0639
Mark J. Morrise, USB No. 3840
CORBRIDGE BAIRD & CHRISTENSEN
Attorneys for Appellants/
Cross-Appellees
215 South State Street, Suite 800
Salt Lake City, Utah 84111

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Utah Cases

Other Cases

Rules

Statutes

Other Authorities

STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to U.C.A. § 78-2(a)-3(2)(k).

STATEMENT OF ISSUES

1. Did the trial court commit reversible error in finding that the evidence at trial was insufficient to support American Vending's claims of fraudulent or negligent misrepresentation, breach of contract, and mutual mistake?

> Standard of Review: Where the trier of fact has refused to make a finding essential to the plaintiff's claim, the appellate court will not reverse and compel such a finding unless the evidence is so clear and persuasive that all reasonable minds would necessarily so conclude. Erickson v. Bennion, 28 Utah 2d 371, 503 P.2d 139, 141 (1972).

2. Did the trial court abuse its discretion in denying American Vending's Motion for Leave to File Amended Complaint?

> Standard of Review: The appellate court will presume that the trial court properly exercised its discretion unless the record clearly shows the contrary. Donohue v. Intermountain Health Care, Inc., 748 P.2d 1067 (Utah 1987).

3. Did the trial court abuse its discretion in denying American Vending's Motion to Set Aside Fraudulent Conveyance? The standard of appellate review for this issue is the same as for issue No. 2 above.

4. Did the trial court abuse its discretion in denying American Vending's Motion for Order Declaring Trusts Invalid? The standard of appellate review for this issue is the same as for issue No. 2 above.

5. Is the trial court's denial of American Vending's Motion for Partial Summary Judgment a reviewable order?

> Standard of Review: The denial of a motion for summary judgment cannot be appealed following a trial where the denial was based upon a determination that material facts were in dispute and had to be resolved by a trier of fact. Johnson v. Rothstein, 52 Wash. App. 303, 759 P.2d 471 (1988).

6. Did the trial court abuse its discretion in dismissing the bankruptcy trustee from this action? The standard of appellate review for this issue is the same as for issue No. 2 above.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

See Brief of Cross-Appellant at 2-3.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, Disposition Below

For a discussion of the nature of the case, parties, course of proceedings, and disposition at trial court, see Appellants' Brief at 2-6.

B. Additional Proceedings

The following discussion relates to the motions that American Vending Services, Inc. (American Vending) claims the trial court erred in denying.

American Vending filed a Motion for Leave to File an Amended Complaint. The Trusts (the Morses) filed an opposing memorandum of points and authorities. (Record at 1185-90.) Based on the Trusts' memorandum, the trial court denied the motion. (Record at 1326, 1425-26.)

In an attempt to circumvent the trial court's denial of its Motion For Leave to File Amended Complaint, American Vending filed a Motion To Set Aside Fraudulent Conveyance. The Trusts filed an opposing memorandum of points and authorities. (Record at 1386-90.) Based on the Trusts' memorandum, the trial court denied the motion. (Record at 1398, 1490-91.)

In another attempt to circumvent the trial court's denial of its Motion for Leave to File Amended Complaint, American Vending filed a Motion for Order Declaring the Trusts Invalid.

Again, the Trusts filed an opposing memorandum of points and authorities. (Record at 1308-12.) Again, the trial court denied the motion. (Record at 1398, 1492-93.)

In February 1991, prior to the foregoing motions, the trial court joined the Morses' bankruptcy trustee, David Gladwell, to the action. (Record at 1028-30.) Following its denial of the foregoing motions, the trial court dismissed the bankruptcy trustee as a party. (Record at 1735-38, 1756-59).

STATEMENT OF ADDITIONAL FACTS AND RESPONSE TO CROSS-APPELLANT'S STATEMENT OF FACTS

1. The income statement, admitted as plaintiff's Exhibit 6, was prepared by Wayne Morse and reflects the meter readings for the total number of car washes from July 30, 1984 through March 31, 1985, a total period of eight months. The represented money income was an extrapolation from the meter readings during this eight-month period of time. The meter readings were accurate for the eight-month period represented on the income statement. (Record at 2813, 2821-22, 2912, 2928, 2929.)

2. Val Pressler, a potential purchaser of the car wash in early 1985, had received an income statement for the first 5.2 months of the operation of the car wash from Wayne Morse in connection with his potential purchase of the car wash. Like the income statement that was given to Garn and Durbano in connection with American Vending Services, Inc.'s purchase of the car wash, Mr. Pressler's income statement reflected meter readings for car washes through the first 5.2 months of the car wash's operation. Mr. Pressler personally inspected the meters and verified the represented meter readings as accurate for that period of time and personally witnessed a number of cash collections and deposits to make sure that the deposits from the car wash were consistent with the meter readings during the same period of time. (Record at 3036-

3039.)

3. The income from the car wash is seasonal. The months of June, July and August have the lowest income. Income increases through the winter. (Record at 2855, 2865-67.)

4. Neither Mr. Garn nor Mr. Durbano had ever purchased, owned, or operated a car wash and had absolutely no experience in the car wash business. (Record at 2557-60.)

5. Bart Kennington, an employee for American Vending Services, Inc., had never maintained nor operated a car wash before American Vending Services, Inc.'s purchase of this car wash. At trial, Mr. Kennington could not correctly answer questions regarding the technical aspects of running the car wash. Although Mr. Morse gave Mr. Kennington some brief training, Mr. Kennington said he knew all he needed to know and didn't need any further training. (Record at 2582, 2260, 2702, 2865-67.) Wayne Morse, the seller of the car wash, had built and run several car washes including this one prior to the sale of this car wash. He understood the technical aspects of maintaining and running the car wash. (Record at 2925-27, 2941-43.)

6. After American Vending Services, Inc. purchased the car wash, it was very poorly maintained. On several occasions, Wayne Morse observed sprinklers running for several days on end, floor heaters left on overnight, lights left on all night long, coin changer malfunctions, and car wash bays left out of order for days at a time. An additional witness, Val Pressler, who rented the building directly behind the car wash after American Vending Services, Inc. purchased the car wash, also observed that the car wash was poorly maintained by the employee of American Vending Services, Inc. Mr. Pressler personally heard several complaints from users of the car wash while he was a tenant in the building behind the car wash. (Record at

2931-41, 3039-41.)

7. During the spring of 1985, Mr. Morse failed to make his mortgage payment on time because he kept expecting the closing with American Vending Services, Inc. to occur at any time; Mr. Morse expected the latest mortgage payment to be paid out of the closing. However, the closing kept being pushed back. (Record at 2921-22.)

8. During the eight months that the Morses owned and operated the car wash, they made their cash deposits into two separate bank accounts: the car wash account and a second account for a business owned by the Morses, the Morse Construction Company. The Morses made several deposits from the car wash income into the Morse Construction Company account to pay bills due and owing for Morse Construction Company. Diane Morse never deposited any other money into these two accounts other than car wash income and returns of deposits owing to the Morse Construction Company. The Morse Construction Company had gone out of business prior to this period of time and the Morses were using the Morse Construction Company account to deposit certain amounts attributable to Morse Construction Company and, at times, deposits from the car wash to help pay Morse Construction Company bills. (Record at 2807, 2967-68, 2988-93, 2970.)

9. Diane Morse, the individual who collected the money from the car wash and made the deposits, used some of the cash collected from the car wash to purchase supplies for the car wash such as soap, towels, wax, salt, belts for car wash equipment, and supplies for lawn maintenance. The deposits made into the two accounts from the car wash do not, therefore, reflect that portion of income that was used for the purchase of supplies each month. (Record at 2968-70, 2828-32.)

10. Linda Riffle, the Morses' accountant, created the 1984 and 1985 tax returns which reflect a portion of the income for the car wash by identifying all cash deposits into both the car wash bank account and Morse Construction Company account. The cash deposits (deposits of coin and currency) in both accounts are car wash deposits. The Morse Construction Company did not make cash deposits. The income assigned to the car wash as reflected on both the 1984 and 1985 tax returns is not entirely accurate — Ms. Riffle only reported the verifiable cash deposits as income and did not include as income the amounts of cash spent by the Morses on expenses for the car wash such as soap, towels, wax, salt, belts and lawn-maintenance items because it was not verifiable. At the same time, Ms. Riffle did not report any of the cash spent on these expense items as expenses in the tax return because these expenses were not verifiable either. (Record at 2814, 2828-32, 2973-74, 3012, 2996, 3020-22.)

11. The 1984 and 1985 tax returns reflect an accurate representation of deposits for the car wash during the approximate eleven-month period of July 30, 1984 through July 10, 1985. These two tax returns do not reflect any income for the Morse Construction Company as there was no reportable income for Morse Construction Company during this period of time. However, since many bills were paid for the benefit of the Morse Construction Company during this period of time, the 1984 and 1985 tax returns reflect both the car wash and Morse Construction Company expenses. (Record at 2997, 3020-22, 2999-3003.)

12. The 1984 tax return reflects income of $28,143 for the car wash for the months of August through December, 1984. This amount does not include the additional income collected by Mrs. Morse during that same period of time, but spent on supplies rather than deposited. (Record at 2997, 3020-22.)

13. The 1985 tax return shows income for the car wash of $27,005 for the months of January through July 10, 1985. This amount does not include cash collected by Mrs. Morse, during that same period of time, but spent on supplies instead of deposited. (Record at 3005.)

14. American Vending Services, Inc. had an inordinately high water consumption because the timer for the sprinklers at the car wash was broken when American Vending Services, Inc. owned the car wash, causing the sprinklers to run several days at a time continuously. Moreover, during the period of time American Vending Services, Inc. owned the car wash, the weeps on the suds brush system were left open producing gallons of wasted water out of each of the suds brushes, and water was often running continuously in the M & E room. (Record at 2856-58.)

15. American Vending Services, Inc. used an inordinate amount of electricity because during the period of time American Vending Services, Inc. owned the car wash, the office building behind the car wash was being used and lights and boilers at the car wash were never shut down. Mr. Morse personally observed lights being left on throughout the night and heaters under the floors being left on throughout the night. (Record at 2859-63.)

16. Les Froer, a certified real estate appraiser, appraised the car wash on three separate occasions: in 1983 prior to the completion of the car wash; again in 1985, approximately 5.2 months after the car wash had been completed; and again in 1988. (Record at 2763-65, 2776.)

17. Mr. Froer prepared the first appraisal on December 28, 1983 for Mr. Morse prior to constructing the car wash. (Record at 2763-64.)

18. Mr. Froer's second appraisal, performed on February 28, 1985, was based on

the first 5.2 months of income for the car wash and on comparable car wash values. The 1985 appraised value for the car wash was $366,000. Mr. Froer testified that this appraisal was accurate. This appraisal was based on a personal inspection of the car wash and a review of the car wash income records as well as sales prices for comparable car washes in 1985. Mr. Froer testified that the car wash was built in 1985 according to plans and felt good about the quality of its construction. (Record at 2792-94, 2766, 2769, 2775, 2783, 2786.)

19. In 1988, Mr. Froer performed his third appraisal which was based on comparable car wash values in the area, income from the car wash through 1988 and the condition of the car wash in 1988. Mr. Froer gave the car wash a value in 1988 of $200,000. (Record at 2775.)

20. Mr. Froer testified that the value of the car wash dropped from $366,000 in 1985 to $200,000 in 1988 because the car wash had experienced poor income, increased competition since 1985, and lack of care and maintenance since 1985. Although the car wash had been well built and maintained in 1985, during the three years since 1985, much of the maintenance for the car wash had been deferred and the car wash was in a generally poor condition. (Record at 2792-94, 2777, 2785, 2787-90.)

21. Neither Mr. Garn nor Mr. Durbano inspected the car wash meters, deposit slips, or other financial records prior to their purchase of the car wash. Rather than verifying the car wash meters themselves, or any of the financial records that were available to them in 1985, both Mr. Garn and Mr. Durbano decided to rely entirely on Mr. Morse's representations of meter readings set forth in the income statement. Mr. Garn testified that he has sufficient time to inspect the car wash and verify financial records, but declined to do so. (Record at 2488-96, 635-36.)

22. In its statement of the facts (Nos. 6 and 9), Cross-Appellant cites twenty-five different pages from the record in support of its allegation that American Vending Services, Inc. filed articles of incorporation on two separate occasions prior to July 1985 and that both filings were rejected. Not a single one of the pages supports this allegation. The majority of the cited pages address the issue of whether the parties intended to have a corporation purchase the car wash. In fact, Mr. Garn, in responding to his counsel's question at trial, testified that American Food Services, Inc. (the name alleged as the first attempted incorporation) was not intended to be a partner, incorporator, or stockholder relative to the car wash business. (Record at 2665-66.) Mr. Durbano also testified that he "would be" creating a corporation to purchase the car wash at the time that he was negotiating the purchase of the car wash. (Record at 2500.) Mr. Durbano further testified that his "bona fide attempt to incorporate American Vending" consisted of a to do list, dated July 10, 1985, reminding him to incorporate American Vending, Inc., which he didn't get around to doing until August, 1985. (Record at 2583,84.)

SUMMARY OF ARGUMENTS

POINT I: Substantial, credible evidence was introduced at trial to show that the reason American Vending did poorly in its operation of the car wash was because of lack of experience, insufficient training, poor management, increased competition, and poor maintenance. The evidence cited by Appellant is circumstantial and speculative at best, and does not rise to the level which would require an appellate court to reverse a trial court's finding of fact.

POINT II: The trial court acted within its discretion in denying American Vending's Motion for Leave to File Amended Complaint, because an amendment would have prejudiced the Trusts.

POINT III: The trial court acted within its discretion in denying American Vending's Motion to Set Aside Fraudulent Conveyance, because the issues raised in that motion should have been pleaded and were not properly the subject of a motion.

POINT IV: The trial court acted within its discretion in denying American Vending's Motion to Set Aside Fraudulent Conveyance, because the issues raised in that motion should have been pleaded and were not properly the subject of a motion.

POINT V: The trial court's denial of American Vending's Motion for Partial Summary Judgment should be affirmed because material facts were in dispute and therefore the decision is not reviewable; furthermore, it should also be affirmed on the grounds that American Vending waived its right to assert an election of remedies defense; that the defense of election of remedies did not apply to this case; and that the Trusts did not elect a remedy.

POINT VI: The trial court acted within its discretion in dismissing the Morses' bankruptcy trustee from this action because the trustee no longer had an interest in the subject of this action.

POINT VII: American Vending does not satisfy the requirements of the Vincent Drug three-part test because, unlike Vincent Drug, its prior sets of articles were rejected, a filing fee was not retained, and Garn and Durbano did not commence business under a bona fide belief that American Vending was properly organized.

POINT VIII: The doctrine of corporation by estoppel does not apply to this case because

Garn and Durbano made knowing, false representations to the Morses that American Vending was incorporated when, in fact, it had not been.

POINT IX: Pursuant to Rule 4-501, Utah Code of Judicial Administration, the trial court should have waited until the five-day period in which to file a reply had expired before deciding the Trusts' motion for attorney's fees.

POINT X: Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988) is indistinguishable from the instant case, because in both cases the nonmeritorious tactics of the other party drove up the cost of the litigation. The Trusts' revised attorney's fee affidavit accurately stated the legal work performed by the Trusts, and therefore, should have been considered by the trial court.

POINT XI: American Vending is not entitled to its attorney's fees as they relate to the Trusts' points on appeal.

ARGUMENT IN RESPONSE TO CROSS-APPELLANT'S BRIEF

POINT I: The Evidence Before The Trial Court Was Not Sufficient To Warrant Rescission of The Agreement.

In its Findings of Fact and Conclusions of Law the trial court made the specific affirmative finding that the evidence concerning, fraud, misrepresentation, breach of contract and mutual mistake was insufficient to permit American Vending Services, Inc., the right to rescind the contract. (Record at 2023-24.) Where a trial court has made a specific affirmative finding, the appellate court will not upset that finding as long as there is a reasonable or substantial basis in the evidence to support the finding. Erickson v. Bennion, 503 P.2d 139 (Utah 1972). It is not the appeal court's responsibility to reweigh the evidence, particularly in the face of a trial court's finding that the plaintiff did not sustain its burden of proof. Coonrod

v. Motel Enterprises, 535 P.2d 975 (Kan. 1975).

In its brief, the cross-appellant claims that it presented overwhelming evidence to the court in support of its theories of fraudulent misrepresentation, negligent misrepresentation, material breach and mutual mistake. This suggested evidence can be categorized as follows: (1) American Vending never made as much money with the car wash as the Morses; (2) the Morses were late a few times on their mortgage payment; (3) the income showing on the deposits and the tax returns is not consistent with the income represented in the income statement; (4) American Vending's utility usage is roughly equivalent with the utility usage of the Morses for the car wash; (5) the appraised value of the car wash in 1988 was greater than the appraised value in 1985.

The cross-appellants failed to put on any direct evidence that the income figures set forth in the income statement given to Garn and Durbano prior to the purchase of the car wash was inaccurate. Instead, all of the evidence presented at trial was circumstantial. Although fraud may be proved by circumstantial evidence, the evidence must still be clear and convincing. Territorial Savings and Loan Association v. Baird, 781 P.2d 452 (Utah App. 1989); Cheever v. Schramm, 577 P.2d 951 (Utah 1978). Circumstantial evidence that does nothing more than create suspicion or innuendo does not meet the burden of clear and convincing proof. Taylor v. Gasor, Inc., 607 P.2d 293 (Utah 1980); Lundstrom v. Radio Corporation of America, 405 P.2d 339 (Utah 1965); Oberg v. Sanders, 184 P.2d 229 (Utah 1947). Proof which merely suggests the possibility of fraud on the part of the Seller is nothing more than conjecture and does not satisfy the clear and convincing standard of proof required in a fraud case. See Oberg v. Sanders at 236.

The "overwhelming evidence" suggested by the cross-appellant in support of its claims is either inaccurate, incomplete, taken out of context, or completely ignores the explanations contained in the record. At best, the suggested evidence is merely suggestive or conjecture — it certainly does not rise to the level of clear and convincing evidence. In fact, the record does contain substantial evidence supporting the trial court's finding that the cross appellant did not meet its burden of proof, as explained below.

A. American Vending never made as much money with the car wash as the Morses.

Durbano, Garn and Bart Kennington all testified that the car wash never made more than $2,400 during any one month that they operated it. Their conclusion, that Garn and Durbano's failure to make money at the car wash necessarily means that Mr. Morse misrepresented his experience with the car wash, is conjecture at best. Such a conclusion, especially in light of all of the evidence given at the trial, certainly does not satisfy the clear and convincing standard of proof required in a fraud case.

Mr. Morse made it clear that his income statement, which represented a monthly income average of $5,830.83, represented his experience for the eight months from July 31, 1984 through March 31, 1985. These eight months represented the eight stronger months of the year. According to Mr. Morse, had the income statement represented the entire year, it would certainly have been lower than the $5,830.83 that the income statement represented. However, there is no way of knowing how much lower Mr. Morse's income average per month would have been had he continued to run the car wash through the slower spring and summer months of 1985. In direct contrast, the lower monthly average testified to by Mr. Durbano reflects over three years of running a car wash that eventually performed so poorly that the cross-appellant

allowed the first mortgage holder to take it back.

Testimony at trial given by both Mr. Morse, Garn, Durbano and Kennington made it clear that while Mr. Morse had owned and operated several car washes and knew how to operate them, neither Garn, Durbano, nor Kennington had ever owned or operated a car wash. In fact, Bart Kennington testified that he received a few hours of training and then didn't feel he needed any more training before setting out to manage and maintain the car wash on his own. At the trial, Mr. Kennington was unable to answer questions regarding the technical aspects of running the car wash while Mr. Morse amply demonstrated his experience and ability to run the car wash successfully.

Finally, three different witnesses at the trial testified regarding the poor maintenance of the car wash after American Vending purchased the car wash. Mr. Morse indicated that he observed on more than one occasion sprinklers left on for days at a time, floor heaters left on overnight, lights left on overnight, coin changers out of order, and entire car bays out of order for days at a time. An early potential purchaser of the car wash, Val Pressler, also testified that while renting and occupying the small office building directly behind the car wash, he personally observed poor maintenance on the car wash. In fact, he received several complaints from people using the car wash who would come to his office thinking he was the owner. Les Froer, an appraiser who had occasion to inspect the car wash both before the sale in 1985 and three years after the sale, in 1988, testified that the car wash had been poorly maintained in the three years after American Vending purchased it.

Les Froer also testified that Mr. Morse appeared to have timed his building of the car wash very well. There was very little competition from other car washes in 1985 where

substantial competition had entered the marketplace soon after 1985 causing the value of the car wash to depreciate substantially by 1988.

Although there was no clear evidence presented at trial which would fully explain why American Vending did not do as well as Wayne Morse in operating the car wash, to suggest that the only explanation for American Vending's poor performance is a misrepresentation in the income statement on the part of Mr. Morse simply ignores the evidence. The more probable explanations for American Vending's failure would be Garn, Durbano and Kennington's lack of experience, poor management and maintenance of the car wash and increased competition in the marketplace since 1985. Had Garn and Durbano had any expertise and given the car wash the kind of daily attention that Wayne Morse and his wife spent on the car wash, they might very well had been as successful. To suggest otherwise does not satisfy the clear and convincing standard of proof required in a fraud case.

B. Morses were late on their mortgage payments.

Wayne Morse testified that he was, in fact, late on a few of his mortgage payments because he had expected the closing to take place sooner than it actually did. He testified he had hoped to make his final mortgage payment out of the closing of the sale of the car wash. Again, to suggest this as support for a fraud claim clearly ignores Mr. Morse's explanation.

C. Deposits and Tax Return Income.

At trial, Garn and Durbano tried to show that the deposits made into the Morses' car wash account were far short of the amount of income represented in the income statement to Garn and Durbano prior to the sale of the car wash. Again, the cross-appellant has ignored the great body of evidence explaining how the deposits worked in connection with the car wash

business when it was owned by the Morses. Both Wayne and Diane Morse and their accountant, Linda Riffle, clearly explained how the deposits worked relative to the coin and currency taken from the car wash each day. During the 11 or so months that the Morses owned the car wash in 1984 and 1985, they actually had two business accounts. One account was specifically used for the car wash. A second account had been used for Morse Construction Company. Although Morse Construction Company had been closed, there still were many outstanding bills that needed to be paid by Morse Construction Company. On several occasions, coin and currency was taken from the car wash and deposited into the Morse Construction Company account to help pay outstanding bills that could not be covered by Morse Construction Company deposits.

Both the 1984 and 1985 tax returns prepared by Linda Riffle, a certified public accountant, reflected all of the coin and currency deposits made into both accounts. Ms. Riffle testified that the income set forth on the schedules (See both the 1984 and 1985 tax returns) represented only car wash income. Although there were deposits attributable to Morse Construction Company in 1984 and 1985, none of those deposits were considered income for tax purposes (they were actually returns of deposits that had been taxed in prior years). Ms. Riffle testified that the 1984 and 1985 tax returns are an accurate representation of the actual deposits made by the car wash during the 11 1/2 months the Morses owned the car wash.

The only inaccuracy in the tax returns according to both the Morses and Ms. Riffle is the fact that Diane Morse would often take cash from the car wash and purchase supplies needed for the car wash such as soap, towels, wax, salt, belts for the equipment, and items needed for lawn maintenance rather than deposit the money directly into one of the two accounts. Hence, although the tax returns do reflect all of the cash that was deposited in the two accounts, it does

not reflect the actual, total income experienced by the car wash. Both the Morses and Ms. Riffle estimate that the actual income is somewhat higher than that set forth on the tax returns. Ms. Riffle felt that this was the appropriate way to handle the unverifiable amounts of income because she did not include as expenses on the tax returns the amounts spent on supplies needed for the car wash because the supplies were also unverifiable.

The 1984 tax return indicates income for the five months of 1984 for the car wash of $28,143. The 1985 tax return indicates an income for the six months of 1985 of $27,005. This averages out to approximately $5,000 per month of income for the 11 months that the Morses owned and operated the car wash. Recognizing that this tax return income average would have been higher had Mrs. Morse deposited some of the cash prior to purchasing supplies and also recognizing that a one-year income statement for the car wash (which would have factored in the slower months after March of 1985) would have included a lower per month average — the indicated income on the income statement and tax returns is very close.

D. Utility Usage.

Wayne Morse testified that from his personal observance the car wash was poorly run and maintained while American Vending owned and operated it. Mr. Morse personally observed sprinklers running for several days at a time, floor heaters left on overnight, lights left on all night long, coin changer malfunctions, and car wash bays left out of order for days at a time. Such mismanagement and waste would have run the utility expenses of the car wash way out of proportion to the actual use of the car wash by American Vending. To suggest that American Vending's usage of water and electricity was in any way comparable to Wayne Morse's use of electricity and water simply is not justified and is suggested to merely create suspicion.

E. Appraisals.

Finally, the cross-appellant suggests that the drastic reduction from Les Froer's 1985 appraisal of $366,000 for the car wash to $200,000 in 1988 establishes that the original appraisal greatly misrepresented the value of the car wash. Mr. Froer, who was called as a witness by the cross-appellant, testified that both his 1985 and 1988 appraisals were entirely accurate. He inspected the car wash in both 1985 and in 1988. Both appraisals were based on income experienced by the car wash when the appraisals were performed and comparable values then available. Mr. Froer's 1985 appraisal was based on income that had already been experienced by the car wash during the first 5.2 months of operation. He felt the car wash had been built according to plans and felt that its quality was good. Mr. Froer testified that the reduced value for the car wash in 1988 was justified because the car wash had experienced poor income since 1985, increased competition since 1985 and a general lack of care and maintenance since 1985. Although the car wash had been well built and maintained in 1985, during the three years since 1985, Mr. Froer felt that much of the maintenance for the car wash had been deferred and that the car wash was in generally poor condition. There was absolutely no evidence from Mr. Froer or any other witness at the trial to suggest that the 1985 appraisal "greatly misrepresented the value of the car wash."

In conclusion, the facts presented by the cross-appellant in support of its fraud, misrepresentation, breach and mistake claims do not directly rebut the representations made by Wayne Morse in his 1985 income statement. At best, they only suggest what the cross appellant is required to prove by clear and convincing evidence. However, after considering all of the evidence, it becomes clear that American Vending did poorly in its operation of the car wash

for any number of reasons: Lack of experience, little training, poor management, increased competition, poor maintenance. To suggest that the Morses misrepresented their experience with the car wash as the only explanation for American Vending's problem flies in the face of the entire body of evidence, as the lower court so concluded.

Actionable fraud requires that the person claiming to be defrauded must have a right to rely on the representations of the other party. Cheever at 954. The party that has the opportunity of ascertaining facts cannot neglect to investigate those facts and later allege a want of knowledge. Taylor v. Moore, 51 P.2d 222 (Utah 1935). Moreover, a party who complains of being defrauded cannot heedlessly accept as true whatever is told him; he has the duty to protect his own interests by making such investigation and inquiry into the facts as reasonable care under the circumstances would dictate. Cheever at 954; Besner v. Continental Dry Cleaners Inc., 548 P.2d 898 (Utah 1976) (if a purchaser of a business fails to make such independent investigation as an ordinary, reasonable and prudent person would do under the circumstances, he is precluded from holding the seller of the business liable for any misrepresentations). In such a case, the purchaser's reliance on the seller's representations simply is not reasonable. See Jardine v. Brunswick Corporation, 423 P.2d 659 (Utah 1967). In other words, no matter how naive or inexperienced a purchaser of a business might be, that purchaser cannot close his eyes and accept unquestioningly any representations made to him. He has a duty to make such investigation and inquiry as reasonable care under the circumstances would dictate. Lewis v. Wight, 269 P.2d 865 (Utah 1954). Hence, careless indifference to information which would enlighten the purchaser as to the truth or falsity of a seller's assertions as to value and blind reliance upon a seller's representations does not satisfy the reasonable

reliance requirement in the of proof of fraud. Wright v. Westside, 787 P.2d 508 (Utah App. 1990).

Both Mr. Garn, an experienced businessman, and Mr. Durbano, a business attorney, admit to having relied entirely on the income statement given to them by Mr. Morse. Neither Mr. Garn nor Mr. Durbano inspected the car wash meters, deposit slips, or other financial records that were available to them prior to the purchase of the car wash.

Mr. Morse made it very clear on more than one occasion during the trial that the income statement that he prepared was an accurate representation of the meter readings through March 30, 1985. His representation of cash income was clearly an extrapolation of those meter readings. His certifying that the income statement was accurate was merely a certification that the meter readings set forth in that income statement was correct. Certainly, such a representation could in no way be construed as reckless conduct. Rather than verifying the car wash meters themselves, or any of the financial records that were available to them in 1985, both Mr. Garn and Mr. Durbano decided to rely entirely on Mr. Morse's representations of meter readings set forth in the income statement. Moreover, Mr. Garn testified that he had sufficient time to inspect the car wash and verify financial records, but declined to do so. Having failed to participate in any reasonable inspection or verification, neither Mr. Garn nor Mr. Durbano can now claim that their reliance on Mr. Morse's income statement was reasonable.

The cross-appellant's claims of negligent misrepresentation, material breach of contract and mutual mistake, are clearly recharacterizations of the fraud and misrepresentation claims set forth above. All of the evidence submitted at the trial as set forth above makes it clear that the

Morses' representations in the income statement were correct. The cross-appellants' allegations are nothing more than suggestion or conjecture. As such, they do not rise to the required burden of proof for negligent misrepresentation, material breach of contract or mutual mistake.

POINT II: The Trial Court Acted Within its Discretion In Denying American Vending's Motion For Leave to File Amended Complaint

The trial court denied a motion by American Vending for leave to file an amended complaint. (Record at 1326, 1425-26.) In so doing, the trial court acted within its discretion, based upon the Trusts' opposing memorandum of points and authorities (Record at 1185-90), which is summarized below.

In Westley v. Farmers Insurance Exchange, 663 P.2d 93 (Utah 1983), the Utah Supreme Court upheld a Third District Court ruling which refused to grant leave to file an amended complaint on the bases that (1) the substance of the plaintiff's new allegation was known a full year earlier, and (2) the amendment would have delayed the trial.

In the instant case, the substance of the new allegations was known to plaintiff's officer, director and attorney, Douglas M. Durbano, more than five years earlier at the time of the subject transaction on July 10, 1985 and at the very latest in October 1985, when American Vending instituted its action against the Trusts. Despite Mr. Durbano's knowledge and active participation in the purchase of the subject car wash, including executing the promissory note in favor of the Trusts, American Vending waited until March 1991, more than five years later, to file its motion for leave to amend. When the motion for leave to amend was filed, the discovery cutoff was just two months away and a trial was set for just 2 1/2 months away. The amendment would have certainly delayed the trial. Therefore, and in accordance with Westley v. Farmers Insurance Exchange, supra, the trial court did not abuse its discretion in denying the

motion.

American Vending argues that the Trusts were put on notice of the proposed amendment by the allegations already in the complaint. This argument is patently false. The original complaint includes only the issues of fraud in the sale of the subject car wash and mutual mistake. No allegations are set forth concerning a fraudulent transfer by the individual defendants to any trusts nor are any allegations made regarding grounds for imposition of a constructive trust or injunctive relief. Clearly, the new causes of action do not arise out of, nor are in any way a natural result of the causes of action previously alleged in the complaint.

An additional ground supporting the trial court's refusal to allow an amendment was that the claims raised in the amended complaint were barred by the three-year statute of limitations (U.C.A. § 78-12-26(4)) relating to fraudulent transfers[1] and by the four-year statute of limitations (U.C.A. § 78-12-25) relating to constructive trust and injunctive relief. Since the new causes of action did not arise out of the prior causes of action, the relation back language of Utah R. Civ. P. 15(c) is inapplicable, and therefore, the new causes of action fell outside the statutes of limitation.

Furthermore, the Trusts would have been greatly prejudiced by allowing the new causes of action. Since, when the motion to amend the complaint was filed, the trial was set for only 2 1/2 months away, this would not have given the Trusts sufficient time to meet the newly raised matter contained in the proposed amended complaint. In addition, the new causes of action would have required the Trusts to spend substantial time and effort as well as attorneys fees and

---

[1]At the time this lawsuit was filed, fraudulent conveyances were governed by U.C.A. § 25-1-1 et seq. (repealed in 1988 and replaced by U.C.A. § 25-6-1 et seq.) The prior statute had a three-year statute of limitations, U.C.A. § 78-12-26(4).

discovery, and would have resulted in a postponing of the existing trial date.

For all of the foregoing reasons, the trial court acted within its discretion in denying its motion to amend.

POINT III: The Trial Court Acted Within Its Discretion In Denying American Vending's Motion to Set Aside Fraudulent Conveyance.

After the trial court denied American Vending's Motion For Leave to File Amended Complaint, American Vending tried to circumvent this denial by filing a "Motion" To Set Aside Fraudulent Conveyance. The trial court denied this "motion." (Record at 1398, 1490-91.) In so doing, the trial court acted within its discretion, based upon the Trusts opposing memorandum of points and authorities (Record at 1386-90), which is summarized below.

American Vending's "Motion" To Set Aside Fraudulent Conveyance raised a new issue which had never been included in the pleadings. The sole method by which American Vending could properly put this issue before the trial court was to include the issue in its complaint, so as to give fair notice to the Trusts and the court. Rule 1, Utah R. Civ. P.; Taylor v. E. M. Royle Corp., 1 Utah 2d 175, 264 P.2d 279 (1953). To be a valid issue before the court, the issue must be presented in a pleading so that the Trusts could meet the issues and the contentions. Prince v. Petersen, 538 P.2d 1325 (Utah 1975). The Trusts received neither the requisite notice nor the opportunity to answer.

An additional justification for the trial court's denial of the motion was that when the motion was filed, Wayne Morse and Diane Morse were debtors in a chapter 7 bankruptcy proceeding. Pursuant to Bankruptcy Code §§ 544 and 548 (11 U.S.C. §§ 544 and 548), the chapter 7 bankruptcy trustee is vested with the rights of avoidance, including avoidance of fraudulent transfers, to the exclusion of all other parties. Therefore, American Vending had no

standing to bring a motion in state court to set aside fraudulent transfers.

An additional ground for the trial court's denial is that any cause of action for fraudulent transfer on the part of American Vending was barred by the three-year statute of limitations.[2] U.C.A. § 78-12-26(4).

For all of the foregoing reasons, the trial court acted within its discretion in denying American Vending's Motion to Set Aside Fraudulent Conveyance.

POINT IV: The Trial Court Acted Within its Discretion in Denying American Vending's Motion for Order Declaring Trusts Invalid

American Vending's Motion for Order Declaring the Trusts Invalid was another attempt by American Vending to circumvent the trial court's denial of American Vending's Motion for Leave to File Amended Complaint. Again, the trial court denied the motion. (Record at 1398, 1492-93.) Again, the trial court acted within its discretion, based upon the Trusts' opposing memorandum of points and authorities (Record at 1308-12), which is summarized below.

The same reasons which support the trial court's denial of American Vending's Motion to Set Aside Fraudulent Conveyance also support the trial court's denial of American Vending's Motion for Order Declaring the Trusts Invalid. Those reasons, which are set forth in Point III above, are briefly as follows: First, the "Motion" For an Order Declaring The Trusts Invalid raised an issue which had never been included in the pleadings and which the Trusts had not received fair notice of. Rule 1, Utah R. Civ. P.; Taylor v. E. M. Royle Corp., 1 Utah 2d. 175, 264 P.2d 279 (1953). Second, because Wayne and Diane Morse were the debtors in a chapter 7 bankruptcy, the bankruptcy trustee was vested with exclusive rights of avoiding fraudulent

---

[2]See Point II, footnote 1, supra.

conveyances. Third, American Vending's claim to declare the Trusts invalid was barred by the applicable four-year statute of limitations. U.C.A. § 78-12-25. For the foregoing reasons, the trial court acted within its discretion in denying American Vending's Motion for Order Declaring the Trusts Invalid.

POINT V: The Trial Court's Denial of American Vending's Motion For Partial Summary Judgment Is Not Reviewable

American Vending filed a Motion for Partial Summary Judgment, which was based on the doctrine of election of remedies. The trial court denied the motion. (Record at 1402, 1488-89.) On appeal, American Vending argues that the trial court erred in not dismissing American Vending, because the Trusts (the Morses) had elected to pursue Durbano and Garn. According to American Vending, this election occurred when the Morses filed affidavits stating that the Morses had dealt solely with Durbano and Garn and not with American Vending.

For four reasons, the trial court acted correctly when it denied American Vending's motion.

1. The Trial Court's Denial of the Motion for Partial Summary Judgment Is Not Reviewable. The vast majority of jurisdictions hold that an order denying summary judgment, based upon the presence of material, disputed, facts, will not be reviewed on appeal when raised after a trial on the merits. Johnson v. Rothstein, 739 P.2d 471, 473 (Wash. App. 1988). Accord All-States Leasing Co. v. Pacific Empire Land, 31 Or. App. 733, 571 P.2d 192, 194-95 (1977); Fleitz v. Van Westrienen, 114 Ariz. 246, 560 P.2d 430, 432 (1977); Annot., Reviewability of Order Denying Motion for Summary Judgment, 15 A.L.R.3d 899, 922-25 (1967).

In the instant case, the trial court's denial was based on material, disputed facts. Garn

and Durbano had filed affidavits disavowing personal liability on the promissory note and stating that at all times during the subject transaction, they had told the Morses that they (the Morses) would be dealing with a corporation. Copies of these affidavits were attached to the Trusts' memorandum opposing partial summary judgment. (Record at 1357-73.)

The foregoing facts were in direct conflict with the Morses' own affidavits (Record at 725-29, 736-40), which stated that the Morses had dealt with Durbano and Garn as individuals. Thus, it was proper for the trial court to deny the motion so that it could determine at trial which set of facts were true, and such denial is therefore not reviewable.

2. American Vending Failed to Plead the Defense of Inconsistent Remedies. The defense of election of remedies is an affirmative one. It must be raised by way of an answer, motion pursuant to Rule 12, or demand, so as to put the issue before the trial court. If this is not done, it is waived. Royal Resources, Inc. v. Gibraltar Financial Corp., 603 P.2d 793, 796 (Utah 1979); Second Baptist Church v. First National Bank, 510 P.2d 630, 631-32 (Nev. 1973).

In the instant case, prior to its motion for partial summary judgment, American Vending failed to raise election of remedies by way of answer, Rule 12 motion, or demand. The answers of both American Vending and the involuntary plaintiffs do not mention this defense. (Record at 291-99.) Therefore, American Vending waived its right to assert this defense.

3. The Doctrine of Election of Remedies Does Not Apply to This Case. The purpose of the doctrine of election of remedies "is not to prevent recourse to any remedy, but to prevent double redress for a single wrong." Angelos v. First Interstate Bank of Utah, 671 P.2d 772, 778 (Utah 1983), quoting Royal Resources, Inc. v. Gibraltar Financial Corp., 603

P.2d 793, 796 (Utah 1979).[3] In the instant case, however, the Trusts neither sought nor obtained a double recovery, but simply sought to establish which of the two groups (American Vending, or Garn and Durbano) was liable on the promissory note.

The doctrine of election of remedies prevents a plaintiff from seeking inconsistent remedies based on incompatible facts. Farmers & Merchant Bank v. Universal C.I.T. Corp., 4 Utah 2d 155, 289 P.2d 1045, 1049 (1955). In this case, however, the Trusts did not seek inconsistent remedies. Both as to American Vending and as to Garn and Durbano, the Trusts were seeking the same remedy, i.e., a judgment for breach of the subject promissory note.

American Vending argues that "when a party has a cause of action against different entities, and he alleges a fact or assumes a position in one cause of action against one party which is inconsistent with or is repugnant to a fact or position that is necessary to the other cause of action, the party must elect which cause of action he will pursue." In support, American Vending cites Autocar Sales & Service Co. v. Holscher, 11 S.W.2d 1072, 1074 (Mo. Ct. App. 1928).

American Vending misstates the foregoing rule. The rule only applies when a lawsuit is brought against one defendant, and then a second lawsuit, based on inconsistent facts, is brought against a second defendant. 25 Am. Jur. 2d Election of Remedies § 25 (1966); Annotation, Doctrine of Election of Remedies as Applicable Where Remedies Are Pursued Against Different Persons, 116 A.L.R. 601, 607. Thus, in Autocar Sales & Service Co. v.

---

[3]For example, a plaintiff cannot recover the value of its property in one suit, and then recover the property itself in a subsequent suit. Brigham City Sand v. Machinery Center, 613 P.2d 510, 511 (Utah 1980). Similarly, a plaintiff is not allowed, in the same suit, to recover damages by affirming the contract and at the same time rescind the contract. E.g., Nordstrom v. Miller, 227 Kan. 59, 605 P.2d 545 (1980).

Holscher, 11 S.W.2d 1072, 1074 (Mo. Ct. App. 1928), the rule is stated as follows:

> Where a party has ground to bring separate actions against different persons, and the maintenance of one necessitates the allegation of fact, or the assumption of a position, inconsistent with, or repugnant to, the maintenance of another, he is bound by his election, and he cannot proceed against the other.

Usually, the foregoing rule is not applied unless the first lawsuit has gone to judgment. See 25 Am. Jur. 2d Election of Remedies § 25 (1966).

In contrast, it is well established that a party may, in the same lawsuit, sue different parties based on alternative or even inconsistent theories. Rule 8(e)(2), Utah R. Civ. P.; Taiyo Trading Co. v. Northam Trading Corp., 1 F.R.D. 382 (D.N.Y. 1940). If American Vending's argument in this regard were accepted, it would lead to ridiculous results. In the instant case, for example, the Trusts would be prevented from obtaining a judgment against either set of defendants, since the Trusts would have been forced to elect to sue only Durbano and Garn prior to trial. Another example is tort plaintiffs, who would be precluded from suing multiple defendants and having their respective liabilities determined at trial.

In summary, the doctrine of election of remedies does not apply to this case because the Trusts neither sought nor obtained a double recovery, nor did they seek inconsistent remedies. The Trusts were entitled, in the same lawsuit, to plead alternative claims against American Vending and Garn and Durbano. It was proper for the trial court to deny American Vending's motion so that the issue of liability could proceed to trial.

4. The Trusts Did Not "Elect" A Remedy. Even assuming, for argument sake, that the doctrine of election of remedies does apply, no "election" of remedies occurred in this case. Although American Vending argues that the filing of affidavits constituted such an "election," this argument is contrary to the law.

Rule 8(e), Utah R. Civ. P., allows a plaintiff to plead alternative and even inconsistent claims in his complaint.[4] Thereafter, the plaintiff is not required to elect between remedies during the pretrial stage. Rosander v. Larsen, 14 Utah 2d 1, 376 P.2d 146 (1962). "To require a party to make an election between [alternative remedies], particularly during the pretrial stage of the proceedings, would be to emasculate [Rule 8(e)] and render it meaningless." Id. For example, the Utah Supreme Court has held that entering into a stipulation prior to trial does not constitute an election of remedies. Royal Resources, Inc. v. Gibraltar Financial Corp., 603 P.2d 793, 796 (Utah 1979).

American Vending cites no authority, nor have the Trusts been able to find any, which holds that the filing of affidavits can constitute an election of remedies. For this additional reason, the trial court correctly denied American Vending's motion.

For all four of the foregoing reasons, the trial court's denial of American Vending's motion for partial summary judgment should be affirmed.

POINT VI: The Trial Court Acted Within Its Discretion In Dismissing the Morses' Bankruptcy Trustee from this Action

In February 1991, the trial court joined the Morses' bankruptcy trustee, David Gladwell, to the action. (Record at 1028-30.) Subsequently, the trial court denied American Vending's Motion for Leave to File Amended Complaint, Motion for Order Declaring the Trusts Invalid, and Motion to Set Aside Fraudulent Conveyance. (Record at 1326, 1398, 1425-26, 1490-93.) Based on these denials, the trial court dismissed the bankruptcy trustee as a party. (Record at

---

[4]Rule 8(e)(2) provides, "A party may set forth two or more statements of a claim or defense alternatively . . . . A party may state as many separate claims or defenses as he has regardless of consistency." (Emphasis added.)

1735-38, 1756-59).

The trial court acted properly and within its discretion in ultimately dismissing the bankruptcy trustee as a party. Since the court had denied American Vending's attempts to set aside the conveyances to the Trusts and to invalidate the Trusts, there was no reason, under Rule 19(a), Utah R. Civ. P., to keep the bankruptcy trustee in the lawsuit. The bankruptcy trustee was no longer a person in "[whose] absence complete relief cannot be accorded among those already parties," nor did he "claim an interest relating to the subject matter of the transaction." Rule 19(a).

Furthermore, the trial court's dismissal was proper because the bankruptcy trustee should never have been joined as a party in the first place. Bankruptcy Code § 546(a) (11 U.S.C. § 546(a)) requires a bankruptcy trustee to bring fraudulent conveyance and other avoidance actions within two years of the date the case is closed. In this instance, the case was closed in May 1988, more than two years prior to the date the bankruptcy trustee was joined. In addition, the applicable three-year state statute of limitations[5] (U.C.A. § 78-12-26(4)) and one-year bankruptcy statute of limitations (11 U.S.C. § 548(a)) on fraudulent transfers had run, further foreclosing the trustee from pursuing any action against the Morses.

For all of the foregoing reasons, the trial court's dismissal of the bankruptcy trustee should be affirmed.

---

[5]See Point II, footnote 1, supra.

ARGUMENT IN REPLY TO APPELLEE'S BRIEF

POINT VII: The Doctrine of DeFacto Corporation Was Abolished by the Utah Business Corporation Act, and Does Not Apply to This Case

A. The Doctrine of DeFacto Corporation Was Abolished by the Utah Business Corporation Act

In opposition to the Trusts' position that the Utah Business Corporation Act abolished the doctrine of de facto corporation, American Vending asserts that the Trusts' position is based on Timberline Equipment Co, Inc. v. Davenport, 514 P.2d 1109 (Ore. 1973). American Vending then points to a difference in language between Oregon Revised Statute (ORS) 57.793 (construed in Timberline) and Utah Code Ann. § 16-10-139.

American Vending's argument completely misstates the Trusts' opening brief. (See Appellant's Brief, at 13-14.) The Trusts' position is not based on Timberline; rather, it is based on sections 56 and 146 of the Model Business Corporation Act and the official comments thereto (which are quoted in Timberline).

Contrary to what American Vending suggests in its brief, there is no difference in the language between sections 56 and 146 of the Model Act and §§ 16-10-51 and 16-10-139 of the Utah Act. The Utah Act sections follow the Model Act sections verbatim. In particular, the Model Act § 146 and U.C.A. § 16-10-139 both contain the "so to do" language relied on by American Vending.[6]

Because the Utah Legislature enacted these sections verbatim, the only reasonable conclusion is that the Legislature intended to follow the expressed intent of the Model Act. The

---

[6]Both Model Act § 146 and U.C.A. § 16-10-139 provide: "All persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof." (Emphasis added.)

official comments to the Model Act, however, unequivocally state that the Act was intended to abolish the doctrine of de facto corporation.[7] Hence, it is clear that the Utah Supreme Court's decision in Vincent Drug Co. v. Utah State Tax Commission, 407 P.2d 683 (Utah 1965), is contrary to the intent of U.C.A. §§ 16-10-51 and 16-10-139, and therefore should be overruled or narrowly construed.

Furthermore, in focusing this Court's attention on Timberline, American Vending ignores decisions from other jurisdictions with corporation statutes identical to Utah's. These decisions hold, based on the Model Act, that the doctrine of de facto corporation is abolished. E.g., Bowers Building Co. v. Altura Glass Co., Inc., 694 P.2d 876 (Ariz. App. 1984); Robertson v. Levy, 197 A.2d 443 (D.C. App. 1964).

B. This Case Does Not Satisfy the Elements of De Facto Corporation

American Vending next accuses the Trusts of misstating the facts of Vincent Drug Co. v. Utah State Tax Commission, 407 P.2d 683 (Utah 1965) and stretching the opinion to include a requirement that articles of incorporation be filed before a de facto corporation can be found. In regard to the facts of Vincent Drug, American Vending asserts that "presumably" within a few days after January 2, 1962, Vincent Drug's articles of incorporation were returned to the corporation's counsel. (Cross-Appellant's Brief, at 39.)

Once again, it is American Vending who is misstating and stretching the facts. In the Appellant's Brief filed in the Vincent Drug appeal, which brief is on file at the Utah State

---

[7]The official comment to Model Act § 146 (which contains the "so to do" language) states: "This section is designed to prohibit the application of any theory of de facto incorporation." The official comment to Model Act § 56 states, "[A] de facto corporation cannot exist under the Model Act."

Supreme Court Law Library, it is stated as fact that "near the end of January 1962," the articles of incorporation were returned to counsel for Vincent Drug, and that after filing the articles, but prior to their return, counsel for Vincent Drug terminated his private practice and accepted federal employment. (Appellant's Brief in Vincent Drug, at 2-3). Although a change of address card was filed with the U.S. Post Office, the articles of incorporation were delivered to the counsel's former office, "and were not obtained by him, nor was he aware of their return, for several weeks." (Id. (emphasis added).)

Thus, contrary to American Vending's presumption, it is more likely that counsel for Vincent Drug did not learn of the return of the articles until after Vincent Drug had filed its initial tax return. Thus, Vincent Drug was not chargeable with knowledge that their articles were returned until after the act in question.

Furthermore, it requires no stretch of Vincent Drug for this Court to hold that there can be no de facto corporation unless articles of incorporation are first filed. The first element of the Vincent Drug test requires a bona fide attempt to organize. In this regard, "[i]t is generally agreed that one cannot even be said to colorably comply with applicable law until taking the basic step of filing corporate articles." Willis v. City of Valdez, 546 P.2d 570, 573 n.3 (Alaska 1976). Accord Fike v. Bauer, 90 Idaho 442, 412 P.2d 819, 821 (1966).

American Vending argues that it satisfies the three-part test articulated in Vincent Drug. Clearly, however, American Vending wholly fails to satisfy that test.

(1) "A Bona Fide Attempt to Organize A Corporation Under Valid Law Has Been Made". In regard to the first element, American Vending argues that its facts are nearly identical to Vincent Drug. American Vending points to the fact that in both cases, articles of

incorporation were previously filed and rejected, thus establishing a "bona fide" attempt to organize.

The two cases, however, are far apart. In Vincent Drug, the original Articles of Incorporation were not rejected, but were simply returned to the incorporator for correction. (407 P.2d at 683.) Related to this fact is the fact that the license and filing fees were retained by the Secretary of State. Id. Furthermore, when the corporation commenced its business, it did so under the bona fide belief that it was properly organized. Id. at 684.

The foregoing facts were essential to the Vincent Drug analysis. The decision states:

> There is no question but what the Articles of Incorporation were filed with the Secretary of State as required and the fees paid before the corporation herein commenced its corporate existence under its bona fide belief that it had been properly organized as such. The fees were never returned and the charter was actually issued within a few months after the correction was made. We therefore hold that the plaintiff herein was a corporation de facto as of January 2, 1962 . . . . [407 P.2d at 684 (emphasis added).]

In the instant case, unlike Vincent Drug, the trial court specifically found that the two prior sets of articles were "rejected," not simply returned for correction. (Findings of Fact, ## 3 & 4.) Unlike Vincent Drug, there is no finding in this case that the filing fees for the two prior corporations were retained by the Department of Commerce. Furthermore, unlike Vincent Drug, it was impossible for Garn and Durbano to have dealt with the Morses under a "bona fide belief" that the third corporation (American Vending Services) had been properly organized. Garn and Durbano knew that the two prior sets of articles had been rejected; they also knew that they had not yet filed the articles for the new corporation. (See Findings of Fact, ##4, 11.)

In short, none of the essential factors upon which the Vincent Drug court relied are present in this case. Therefore, the findings do not support the trial court's conclusion that

American Vending Services was a de facto corporation at the time of the car wash sale.

Another obvious distinction between this case and Vincent Drug was that in Vincent Drug, the Corrected Articles were for the same corporation as was originally organized. In the instant case, the new set of articles was for a new, wholly different corporation than the prior two corporations, which had different names and hence were different entities.

American Vending argues, without citing to the record, that "Durbano and Garn both testified . . . that the two prior rejections resulted from efforts to form a corporation to purchase the Carwash." (Appellee's Brief, at 42.) There is no evidence in the record that connects Durbano's alleged attempt to incorporate a business on two prior occasions (without any documentary evidence to back up these allegations) with his incorporation of American Vending Services, Inc. In fact, the names used for the alleged prior incorporation attempts were identical (on the first attempt) to the name of Garn's food vending business (American Food Services, Inc.) which Garn very clearly stated was not to be confused with or in any way connected with the car wash business. Moreover, in direct contradiction to American Vending's unsupported argument, Doug Durbano testified at the trial that his "bona fide attempt to incorporate American Vending" consisted of a to do list, dated July 10, 1985, reminding him to incorporate American Vending, Inc. — which of course, he didn't get around to doing until August of 1985.

Furthermore, even if it were true that the two prior rejections resulted from efforts to form a corporation to purchase the Carwash, that would not be sufficient to protect Garn and Durbano from personal liability. In Gillham Advertising Agency, Inc. v. Ipson, 567 P.2d 163 (Utah 1977) (which American Vending attempts to distinguish), the defendant, Ipson, was connected with a Nevada corporation named Bonneville Raceways Park. He tried to qualify this

corporation to do business in Utah, but was unable to do so because there was a Utah corporation with a similar name. He later executed an agreement as president of "Bonneville Raceways." The Utah Supreme Court held that, despite his attempt to qualify the Nevada corporation, the defendant was personally liable pursuant to U.C.A. § 16-10-139. 567 P.2d at 164-65.

Gillham is more factually similar to the instant case than Vincent Drug, and hence is controlling. The primary distinction between the two cases is that in Gillham there simply was no corporation by the name of Bonneville Raceways, whereas in Vincent Drug articles of incorporation had been duly filed prior to the act in question. Gillham summarily holds that failure to incorporate, despite attempts to do so, brings the individual who purports to act in behalf of the corporation under the control of U.C.A. § 16-10-139.

(2) "The Incorporators Have Done Business as Such Corporation". American Vending argues that it did business prior to its incorporation on August 19, 1985. The critical date, however, is July 10, 1985, the date of the car wash sale. If the second element was not satisfied as of that date, then no de facto corporation existed as of that date. There were, however, no findings and no evidence that American Vending did business prior to that date. Furthermore, even after July 10, 1985, very little, if any, business was done in the corporate name. (See Appellant's Brief, at 9, 26.)

(3) "But for Some Unintentional Defect There Would Be a De Jure Existence". American Vending argues that the requisite "unintentional defect" was that two prior sets of articles had been filed and returned and that "corrected Articles had not been filed prior to doing the act upon which corporate existence is challenged." (Cross-Appellant's Brief, at 41.) The

error in this argument is three-fold: first, the two prior sets of articles were rejected, not returned. Second, Garn and Durbano did not file corrected articles; rather, they filed new articles under a new name. Third, Garn and Durbano obtained pre-approval of the name "American Vending Services, Inc." twelve days prior to the car wash sale. (Finding of Fact #5.) Thus, their failure to file a new set of articles during that time period was intentional, not unintentional.

This case is totally unlike Vincent Drug, where the articles were returned due to an unintentional defect (failure to include addresses), which was remedied by filing Corrected Articles.

In short, American Vending fails to satisfy any of the three tests required by Vincent Drug, and therefore does not satisfy the de facto corporation doctrine. Therefore, the trial court's ruling that American Vending was a de facto corporation should be reversed.

POINT VIII: The Doctrine of Corporation by Estoppel Was Also Abolished by the Utah Business Corporation Act, and Also Does Not Apply to This Case

A. The Doctrine of DeFacto Corporation Was Abolished by the Utah Business Corporation Act

In opposition to the Trusts' position that the Utah Business Corporation Act abolished the doctrine of corporation by estoppel, American Vending attacks the various cases that the Trusts cited in support of that position. Briefly, the Trusts' reply is as follows:

- Timberline Equipment Co, Inc. v. Davenport, 514 P.2d 1109 (Ore. 1973), does not recognize the doctrine of corporation by estoppel. "In view of our decision that the defense of estoppel was not established, we do not need to decide the effect of the new Business Corporation Act on the doctrine of estoppel. 514 P.2d

at 1111 n.1.

- Although Booker Custom Packing Co., Inc. v. Sallomi, 716 P.2d 1061 (Ariz. App. 1986) does not expressly mention the doctrine of corporation by estoppel, the effect of the case is the same as if it did. Furthermore, Booker Custom Packing was decided after Spurlock v. Santa Fe Pacific R. Co., 694 P.2d 299, 314 (Ariz. App. 1984), which American Vending cites to support as evidence that the Arizona courts have upheld the doctrine of corporation by estoppel.
- In Nielson v. Smith, 107 P.2d 158, 162 (Utah 1940), the doctrine of corporation by estoppel is neither discussed nor expressly recognized. Furthermore, that case was decided prior to the enactment of the Utah Business Corporation Act. Therefore, Nielson v. Smith's holding is not relevant to the Trusts' position that the Utah Business Corporation Act abolished the doctrine of corporation by estoppel.

B. The Doctrine of Corporation by Estoppel Does Not Apply to this Case.

In opposition to the Trust's position that doctrine of corporation by estoppel does not apply to this case, American Vending makes two arguments. The first is its unqualified assertion that "a person or entity who contracts with a corporation as such is estopped to deny the corporate existence." (Appellee's Brief, at 47.)

The authorities cited by American Vending, however, qualify this rule with limitations and exceptions that make the rule inapplicable in this case. For example, American Vending cites 18A Am. Jur. 2d Corporations § 262, which states:

> In order to properly apply the doctrine of corporation by estoppel, the cases must be classified according to who is being charged with the estoppel.[46]

The case cited in footnote 46 is Timberline Equipment Co v. Davenport, 267 Or. 64, 514 P.2d 1109 (Ore. 1973), which states, "when individuals such as the defendants in this case seek to escape liability by contending that the debtor is a corporation, . . ., rather than the individual who purported to act as a corporation, the courts are more reluctant to estop the plaintiff from attacking the legality of the alleged corporation." 514 P.2d at 1112. In other words, where the person being charged with estoppel is suing the individuals who falsely purported to act as a corporation, estoppel should not apply.

Another legal authority relied on by American Vending in support of its first argument is a quotation from Brandtjen & Kluge, Inc. v. Biggs, 288 P.2d 1025 (Ore. 1955), which in turn is quoting from 8 Fletcher Cyclopedia of Corporations § 3910. In its quotation, however, American Vending conveniently omits the following underlined language:

> Subject to the limitations and exceptions already noted, . . . it is well settled . . . that a person who contracts or otherwise deals with a body of men as a corporation thereby admits that they are a corporation, and is estopped to deny their incorporation, in an action against him based upon or arising out of such contract or course of dealing. [288 P.2d at 1028.]

The "limitations and exceptions" referred to include an exception for misrepresentations regarding corporate status. "The rule [regarding corporation by estoppel] does not apply in the case of fraud, as where the recognition of a pretended corporation is itself brought about by false representations that it is incorporated." 8 Fletcher Cyclopedia of Corporations § 3917 (1992). Accord id. at § 3909; Federal Advertising v. Hundertmark, 160 A. 40 (N.J. 1932). This is exactly what occurred in the instant case: Garn and Durbano knowingly and falsely represented, at the time of the car wash sale, that American Vending Services, Inc. had been incorporated,

when in fact it had not. (Trial Transcript at 147-51.)

The foregoing point distinguishes all of the cases cited by American Vending regarding corporation by estoppel. In none of those cases was estoppel applied to protect persons who had knowingly and falsely represented that their corporation existed. For example, in Bukacek v. Pell City Farms, Inc., 237 So.2d 851 (Ala. 1970), the person estopped was one of the incorporators. The other cases are similarly distinguishable on the ground that the person estopped was not a victim of knowing, false representations.

If this court were to rule in favor of American Vending, it would be the first time, anywhere, that a court has allowed persons who knowingly and falsely represented their corporate status to avail themselves of the "corporation by estoppel" doctrine. Such injustice should not be countenanced by this court.

American Vending's second argument is that "where a defendant, sued by a plaintiff representing itself to be a corporation, either admits the plaintiff's corporate existence in his answer or files a counterclaim in the action, the defendant is estopped from denying plaintiff's corporate existence." (Appellee's Brief at 47-48.) In support, American Vending cites 18A Am. Jur. 2d Corporations § 272. This section, however, states that "instituting a suit against a supposed corporation does not work an estoppel where such an action is abandoned on learning that the supposed entity has no corporate existence." Accord 8 Fletcher Cyclopedia of Corporations § 3945 (1992).

Again, this is what happened in the instant case. When the Trusts (the Morses) were first sued, they filed a counterclaim against American Vending Services, Inc. As soon as the Trusts learned, however, that American Vending Services, Inc. was not validly organized at the time

of the car wash sale, the Trusts amended their counterclaim as follows:

> 18. American Vending Services, Inc. was not incorporated until August 19, 1985, and therefore, involuntary plaintiffs and counterclaim defendants Kevin S. Garn and Douglas M. Durbano executed the Agreement, Note, and Trust Deed in their individual capacities on July 10, 1985. [Record at 210-11.]

Brandtjen & Kluge, Inc. v. Biggs, 288 P.2d 1025 (Ore. 1955), cited by American Vending, is distinguishable because in that case no attempt was made to amend the pleadings once the lack of corporate existence was discovered.

Furthermore, it was proper for the Trusts to admit the corporate existence of American Vending Services when the complaint was filed, since by then American Vending was validly incorporated.

POINT IX: The Trusts Were Prejudiced by TheTrial Court's Ruling on Attorney Fees

In opposition to the Trusts' position that the Trusts were prejudiced by the trial court's premature ruling on the Trusts' request for attorney fees, American Vending argues that it was the Trusts' own fault that the request was decided before the Trusts filed their reply memorandum. American Vending asserts the Trusts either (1) should have filed their notice to submit earlier, or (2) should have withdrawn the notice when the Trusts learned that a responsive memorandum had been filed by American Vending.

The Trusts, however, acted properly in waiting to file the notice to submit so that any responsive memoranda could arrive by mail. Furthermore, Rule 4-501 contains no provision for withdrawing a notice to submit, and thus the Trusts were justified in not withdrawing their notice. Since Rule 4-501 expressly allows five days to file a reply memo, the trial court should not have decided the motion until that five-day period had elapsed.

American Vending attempts to distinguish Gillmor v. Cummings, 806 P.2d 1205 (Utah

App. 1991), on the grounds that the case involved a response memorandum, and this case involves a reply memo. In both cases, however, the same principle of fairness applies: A party should be allowed the requisite number of days to respond to the opposing party before the motion is decided.

POINT X: The Trial Court's 90% Reduction of the Trusts' Attorney Fee Request Is Unsupported by the Record

In opposition to the Trusts' position that the trial court's 90% reduction of attorney fees was unsupported by the record, American Vending attempts to distinguish Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988). American Vending argues that, unlike the defendant's counterclaims in Dixie State, American Vending's claims were meritorious.

American Vending's claims, however, were hardly meritorious, since the trial court denied practically every one of them. Furthermore, the merit or non-merit of American Vending's claims is not solely determinative. The Dixie State Bank court looked not just at the merits of the defendant's claims, but also the defendant's nonmeritorious "tactics" and "positions." 764 P.2d at 991. These included unsuccessful pre-trial motions and litigation delays. Id. In the instant case, American Vending continually engaged in unmeritorious tactics, as evidenced by the 19 unsuccessful motions it filed. (See Appellant's Brief, Addendum at 28-32.) Thus, the two cases are not distinguishable.

American Vending next argues, without any citations to the record in support, that the evidence supported the trial court's attorney fee award. Since there are no record citations, American Vending's argument should be rejected. Utah R. App. P. 25(a)(9),(e).

Furthermore, American Vending's arguments are contrary to the record and the requirements of Dixie State Bank. (1) American Vending argues that no evidence of a fee

agreement was presented to the trial court. Dixie State Bank, however, does not require that a fee agreement be entered into evidence. Furthermore, the attorneys fee affidavit states that the law firm was "retained" to perform the services, and lists the hourly charges, thus reasonably implying the existence of an hourly fee agreement (written or oral).

(2) American Vending asserts that detailed descriptions of services rendered were not presented to the trial court. The Trusts' original fee affidavit, however, did contain detailed descriptions of services. (Record at 2031-2098.) The Trusts' revised fee affidavit contained those same service descriptions, except that (A) time entries dealing with the Trusts' third-party complaint against Garn and Durbano were eliminated, and (B) a narrative summary of those entries was added to the beginning of the affidavit. (Record at 2137-2203.) American Vending's bald-faced assertion that the Trusts "recreated" the detail for the entries in the revised affidavit is patently false.

(3) American Vending baldly asserts, without citation to the record, that the Trusts' counsel spent "most of their time" pursuing their third-party complaint against Garn and Durbano. Again, this is patently false. This Court is invited to review pages 2137 to 2203 of the record, and see for itself that most of the time spent by the Trusts' counsel, as per their revised fee affidavit, was in responding to the non-meritorious, bad faith motions of American Vending and in attempting to obtain documents requested in discovery.

American Vending asserts that 9 attorneys were "assigned" to the case. In actual fact, however, only two attorneys (James L. Christensen and Michael Lee) had their name on the pleadings. The bulk of the time entries were for James L. Christensen and Michael Lee. (Record at 2031-2098, 2137-2203.) Very minor assistance was rendered by other attorneys in

the firm.

This Court should note that the patently false arguments made by American Vending on appeal, which arguments are disproved simply by looking at the attorneys fee affidavits in question, are indicative of the non-meritorious, bad faith arguments made by American Vending throughout this litigation.

(4) American Vending asserts that the issues are not novel or difficult. American Vending's own actions belie this assertion, since American Vending filed motions and memoranda totalling 350 pages at the trial level, and has filed an overlength, 66-page brief, including 11 points on appeal, at the appellate level. The difficulty and complexity of the issues, all of which have been initiated by American Vending, is evidenced by the complexity of this appeal.

(5) Finally, although the fees requested in the revised affidavit ($88,700) exceeded the amount of the judgment, this does not make them per se unreasonable. "The amount of damages awarded in a case does not place a necessary limit on the amount of attorney fees that can be awarded." Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985).

POINT XI: American Vending Is Not Entitled to Attorney Fees on Appeal

In regard to the Trusts' appeal, even if that appeal were denied, American Vending will remain the judgment debtor on the contract. Therefore, under no circumstance should American Vending be awarded its attorneys fees incurred in responding to the Trusts' appeal.

CONCLUSION

The trial court's denial of American Vending's motions should be affirmed, and the relief sought by the Trusts in their original memorandum should be granted.

DATED this 15th day of April, 1993.

CORBRIDGE BAIRD & CHRISTENSEN

By: Mark J. Morrise
James L. Christensen
Mark J. Morrise
Attorneys for Appellants/Cross Appellees

CERTIFICATE OF SERVICE

I, Mark J. Morrise, certify that on the 15th day of April, 1993, I mailed, postage prepaid, four copies of the foregoing Appellant's Reply Brief to the below named counsel, or to a clerk or other responsible person at the office of the below named counsel:

Douglas M. Durbano
Walter T. Merrill
DURBANO & ASSOCIATES
Attorneys for Appellee/ Cross-Appellants
3340 Harrison Boulevard, Suite 200
Ogden, Utah 84403

Robert K. Hilder
CHRISTENSEN, JENSEN & POWELL
Attorneys for Appellees Garn and Durbano
175 South West Temple
Salt Lake City, Utah 84101

Mark J. Morrise
Mark J. Morrise
Attorney for Appellant/Cross Appellee